

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2020-263-E - ORDER NO. 2022-60  
JANUARY 27, 2022

|                                       |                            |
|---------------------------------------|----------------------------|
| IN RE: Cherokee County Cogeneration   | ) ORDER DENYING SECOND     |
| Partners, LLC, Complainant/Petitioner | ) PETITION FOR             |
| v. Duke Energy Progress, LLC, and     | ) RECONSIDERATION FILED BY |
| Duke Energy Carolinas, LLC,           | ) CHEROKEE COUNTY          |
| Defendant/Respondent                  | ) COGENERATION PARTNERS,   |
|                                       | ) LLC                      |

The Commission issued Order No. 2021-604 on August 27, 2021, to resolve Docket No. 2020-263-E, the Complaint of Petitioner, Cherokee County Cogeneration Partners, LLC (Cherokee), against Respondent, Duke Energy Progress, LLC (DEP), and Duke Energy Carolinas, LLC (DEC). Cherokee and DEC/DEP filed petitions for rehearing or reconsideration of the order. On October 12, 2021, in Order No. 2021-680, the Commission denied both petitions for rehearing or reconsideration, ruling:

Having reviewed the petitions of the parties, we find no reason to grant the petitions to rehear or to reconsider the order. The order made findings and conclusions supported by the evidence and consistent with federal and state law. The order constituted the Commission's response to the pleadings and evidence filed in this docket. By way of clarification, however, we direct the parties to DEC and DEP's Late Filed Exhibit No. 1, later Corrected Late Filed Exhibit No. 1, designated as Hearing Exhibit 14, which sets out DEC's avoided cost rate. Hearing Exhibit 14 is based on evidence in the record from DEC which calculated the avoided cost rate in accordance with the provisions of PURPA and applicable law existing at the time Cherokee established its LEO with DEC, pursuant to a ten-year,

dispatchable tolling agreement, the form and term of which Cherokee and DEC/DEP agreed.

Order No. 2021-680, p. 8.

On October 22, 2021, Cherokee filed a petition asking the Commission to rehear or reconsider Order No. 2021-680. Cherokee asserts Hearing Exhibit 14, to which the Commission directed the parties by way of clarification, contains “procedural and substantive deficiencies,” and contends Cherokee introduced “substantial testimony and evidence” through its witness Strunk which was “the only 2018 10-year dispatchable [avoided cost] rate in the record that complies with applicable law as of the date of Cherokee’s LEO.” (Cherokee petition, p. 15-16). In the alternative, Cherokee requested the Commission use the avoided cost rate offered by witness Freund. (*Id.*, p. 16).

We deny Cherokee’s Petition for Rehearing or Reconsideration dated October 22, 2021, because we find Order No. 2021-680, denying the petitions for rehearing with clarification, did not alter or amend Order No. 2021-604, and thus, Cherokee’s Petition for Rehearing or Reconsideration dated October 22, 2021, is not appropriately before the Commission. Order No. 2021-604 made specific findings of fact and conclusions of law, including: “Cherokee established a legally enforceable obligation (LEO) with Duke Energy Carolinas on September 17, 2018, to sell its power at Duke Energy Carolinas’ avoided cost rate approved and determined by the Commission which existed on the date of the obligation.” (Findings of Fact, paragraph 1). Furthermore, Order No. 2021-604 found:

DEC represented to the Commission it is in agreement with Cherokee “that a 10-year dispatchable tolling agreement structure is appropriate based upon current regulatory circumstances.” DEC’s representation is undisputed by Cherokee. Therefore, in accepting this representation by DEC, those matters are resolved and there is no longer any

need for Commission decision related to term or type of agreement. We find the utilization of a dispatchable tolling agreement is logical in this instance for many reasons including, but not limited to, the fact that: Cherokee is not a solar or wind generator QF; Cherokee already exists and is in operation; and Cherokee currently delivers power to DEC on a dispatchable basis.

(Findings of Fact, paragraph 7).

Order No. No. 2021-680 denied the petitions for reconsideration and directed the parties to Hearing Exhibit 14 by way of clarification, which was evidence in the record of the avoided cost rate existing at the time of the LEO, under a ten year, dispatchable tolling agreement, to which the parties had agreed. Order No. 2021-680 did not alter or amend Order No. 2021-604.

South Carolina law provides that a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration.

[T]he prevailing rule in the federal courts is that a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration. In such a case, a new judgment has replaced the previous judgment and the party aggrieved by the alteration may move for reconsideration. . . . If, on the other hand, the trial court denies such a motion, the finality of the judgment is restored[,] and the appeal time begins to run from the date the order is entered.

*Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 2, 518 S.E.2d 56, 58 (Ct. App. 1999).

Order No. 2021-680 did not alter the previous order and was not a new judgment; rather, Order No. 2021-680 denied the petition and merely directed the parties to evidence in the record by way of clarification. There was no change in the Commission's decision

in Order No. 2021-604 or Order No. 2021-680 finding that a legally enforceable obligation was established on September 17, 2018, with Duke Energy Carolina, LLC (DEC). We conclude the second petition is not appropriately before the Commission.

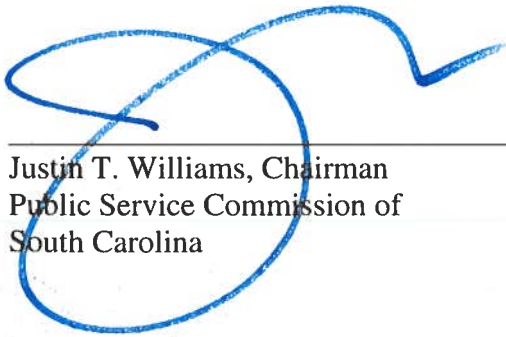
We further find Hearing Exhibit 14 was already part of the record to be considered by the Commission. Late filed Hearing Exhibit 14 was requested by a Commissioner during commissioner questions of a witness during the second day of the hearing. There was no objection raised by any party to the request for or entry of such information requested by the Commissioner. No party filed any comments in response to late filed Hearing Exhibit No. 14, even though Cherokee reserved the right to comment. Cherokee did not file comments on Hearing Exhibit No. 14; however, Cherokee did file comments on DEC/DEP's late filed Hearing Exhibit No. 1.

In addition, we find even if Order No. 2021-680 could be construed by an appellate court as a new basis for the Commission's decision, and thus making the Second Motion for Rehearing or Reconsideration filed by Cherokee appropriate before the Commission for review, we deny Cherokee's second motion for rehearing or reconsideration because there is a reasonable basis, supported by substantial evidence in the record, for the Commission's decision to deny the petition and to adopt the avoided cost rate set forth in Hearing Exhibit 14.

Accordingly, we deny reconsideration of Order No. 2021-680.

This Order shall remain in full force and effect until further Order of the Commission.

**BY ORDER OF THE COMMISSION:**



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Justin T. Williams, Chairman  
Public Service Commission of  
South Carolina